



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

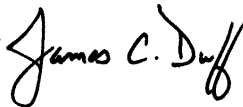
JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

October 26, 2020

MEMORANDUM

To: All United States Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States District Courts
Chief Probation Officers
Chief Pretrial Services Officers

From: James C. Duff 

RE: STATUTORY AMENDMENT TO CRIMINAL RULE 5 (INITIAL APPEARANCE)
(IMPORTANT INFORMATION)

On October 21, 2020, the President signed into law the Due Process Protections Act, Pub. L. No. 116-182, 134 Stat. 894 (Oct. 21, 2020), which amends Criminal Rule 5 (Initial Appearance) by adding a requirement that trial judges “[i]n all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present,” issue an oral and written order: (1) confirming the prosecutor’s disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; and (2) notifying the prosecution of the possible consequences of violating the order. The amendment to Rule 5 further requires that each judicial council promulgate a model order for use by judges. This link will take you to the enrolled bill:

<https://www.congress.gov/116/bills/s1380/BILLS-116s1380enr.pdf>

As many of you know, the Judicial Conference of the United States has consistently opposed direct amendment of the federal rules by legislation, instead urging that Congress defer to the deliberative process of the Rules Enabling Act, 28 U.S.C. §§ 2071–2077, which authorizes amendments to the Federal Rules of Criminal Procedure after broad public participation and review by the bench, bar, academia, the Judicial Conference, the Supreme Court, and Congress. Consistent with this position, the chairs of the Judicial Conference Committee on Rules of Practice and Procedure and its

Statutory Amendment to Criminal Rule 5 (Initial Appearance)

Page 2

Advisory Committee on Criminal Rules sent a letter to leadership of the House Judiciary Committee opposing the direct amendment of Criminal Rule 5, detailing the committees' extensive and continuing work on prosecutorial disclosure obligations, and urging that Congress defer to the Rules Enabling Act process. Unfortunately, that effort was not successful.

The amendment became effective upon enactment. Accordingly, all judges must immediately comply with this new requirement, and judicial councils must draft and promulgate a model order implementing this change as soon as practicable. We are aware that many courts have already started the process of drafting orders to comply with the new requirements imposed by the Act, and we will collect and make those available on the JNet. The amendment to Rule 5 will be reflected in the December 1, 2020 edition of the Criminal Rules pamphlet, which will be published by the House Judiciary Committee in January. Once published, a PDF of that pamphlet will be posted on [uscourts.gov](https://www.uscourts.gov) (<https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>) and, as they do every year, the Rules Committee Staff will mail a printed copy to all federal judges.

You may contact the Judicial Services Office at 202-502-1800 if you have questions concerning implementation of these new requirements. Please forward any orders implementing these new requirements to the Judicial Services Office (Aodb_AO_Duty_Attorney@ao.uscourts.gov) so that we may share for the benefit of your colleagues in other courts.